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In the Supreme Court of the United States

October Term, 1983

DR. CHARLES McDANIEL, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Education for All Handicapped Children Act of 1975, as amended, 20 U.S.C. §§ 1401-1415, requires the provision of education services in excess of the 180-day school year.

(2) Whether Section 504 of the Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, generally requires affirmative action in the provision of educational services to handicapped children, and specifically requires that a school district extend its 180-day school year to provide services for such children.

(3) Whether exhaustion of the administrative procedures provided under the Education for All Handicapped Children Act, as amended, 20 U.S.C. § 1415, are prerequisite to relief under the Act.

(4) Whether the Education for all Handicapped Children Act, as amended, 20 U.S.C. §§ 1401-1415, is procedurally and substantively an exclusive remedy for handicapped children who feel that their educational placement is inappropriate.

(5) Whether a class action must be dismissed if the only class member jurisdictionally qualified to bring suit voluntarily moots his claim.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiffs-Appellees, Cross-Appellants

Georgia Association of Retarded Citizens, individually and in behalf of its members and class,

Russell Caine, individually and in behalf of others similarly situated, by and through his parents and next friends, L. Douglas Caine and Virginia Caine, and

L. Douglas Caine and Virginia Caine, individually and in behalf of others similarly situated.

State Defendants-Appellants, Cross-Appellees

Dr. Charles McDaniel, in his official capacity as State Superintendent of Schools, and individually,

Roy A. Hendricks, A.J. McClung, Mrs. Saralyn Oberdorfer, James F. Smith, Hollis Lathem, Thomas K. Vann, Jr., Pat. G. Kjorlaug, Larry A. Foster, Sr., Asbury Stembridge, and Carolyn Huseman, in their official capacities as State Board of Education Members, and individually, and the

State Board of Education of the State of Georgia

Local (i.e., Savannah-Chatham County) Defendants-Appellants, Cross-Appellees

Dr. Sylvester Rains, in his official capacity as Superintendent of the Savannah-Chatham County Board of Education and individually,

Dr. Donald Knapp, Dr. Martha Fay, Rev. William F. Stokes, II, Emma Adler, Captain Robert Funk, Ester F. Garrison, Spencer Lawton, Jr., Betty McClenden, and Dr. Robert Moreland, Jr., in their official capacities as members of the Savannah-Chatham Board of Education and individually, and the

Savannah-Chatham Board of Education.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, the Board of Education for the City of Savannah and the County of Chatham [Georgia], Dr. Sylvester Rains, Superintendent of said Board, and the nine individuals who comprise its membership, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on October 17, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983). Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* were denied by the Court of Appeals without further opinion on December 2, 1983 (not yet reported).

In the district court, following an initial unreported opinion entered on July 12, 1979, denying Respondents' Motion for Preliminary Injunction, a decision on the merits

was entered on April 3, 1981, and is reported as *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263 (N.D. Ga. 1981). The district court entered a subsequent opinion on May 14, 1981 (unreported), denying Respondents' Motion to alter or amend the district court's judgment. All of the above opinions and orders of the court of appeals and district court, reported and unreported, are included in the Appendix, along with the Judgment of the United States Court of Appeals for the Eleventh Circuit and its denial of Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 17, 1983, with the Order of that Court denying Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* being entered on December 2, 1983. This Petition for a Writ of Certiorari is filed within the ninety days of the Court of Appeals' denial of the Motion for Rehearing and Suggestion of *En Banc* consideration. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, Sec. 1:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Const., Art. III, Sec. 1:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their

Services a Compensation which shall not be diminished during their Continuance in Office."

U.S. Const., Art. III, Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ."

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1401:

"§ 1401. *Definitions*

As used in this chapter—

* * *

(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

20 U.S.C. § 1412:

"§ 1412. *Eligibility requirements*

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

• • •

(6) The State educational agency shall be responsible for assurance that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State education agency."

20 U.S.C. § 1415:

§ 1415. *Procedural safeguards*

Establishment and Maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child

are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of

this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of

this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

29 U.S.C. § 794:

"§ 794. *Nondiscrimination under Federal grants*

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this

Title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

Russell Caine is a child designated as "profoundly or severely mentally retarded" (PSMR). Until 1981, he was enrolled in a specialized program for such children in the Savannah-Chatham County [Georgia] School District. The program is an excellent one, and the quality of services provided has not been an issue in this litigation. The duration of Russell's program, however, was limited to the 180-day school year. Although there is an extended program in the County, it is designed primarily for children with emotional disorders, and the County considered the program inappropriate for Russell's case and refused to consider him for it.

Russell's parents wanted his services extended in duration. Under the Education for All Handicapped Children Act, as amended, 20 U.S.C. §§ 1401-1415 (hereinafter the "Handicapped Act"), the County promulgated an Individualized Education Program (IEP) for Russell, including the 180-day duration. The Caines appealed the appropriateness of the program under the administrative procedure of the Handicapped Act, 20 U.S.C. § 1415(b) and (c). The IEP was upheld by both the local and state tribunals. The administrative appeal process lasted about six months.

Having exhausted the administrative appeal, the Caines filed suit in the United States District Court for the Northern District of Georgia in November 1978, as they were entitled to do under the Handicapped Act, 20 U.S.C. § 1415(e). The case was certified as a class action on July 11, 1979.

Russell and his parents were joined by the Georgia Association of Retarded Citizens (GARC) and two classes, representing PSMR children in Georgia who require more than 180 days of educational placement and those children's parents and guardians. The Defendants were the county and State boards of education, along with their superintendents and members.

The Complaint alleged that Russell Caine and children similarly situated had unique needs which required an education in excess of the normal 180-day school year. It further alleged that Defendants had a policy and practice of failing and refusing to consider such needs in excess of the 180-day school year. Such failure and refusal to consider was alleged to be violative of the rights of the class of Plaintiffs under the Handicapped Act, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (hereinafter "Section 504"), the Fourteenth Amendment to the Constitution of the United States and the Adequate Program for Education in Georgia Act (*Ga. Code* 32-601(a) *et seq.*).[1] The responsive pleadings of the Local Defendants denied that Russell Caine or the class of children that he purportedly represented needed a program of education in excess of 180 days, denied that there was any such failure or refusal to consider such a program, denied that it had a legal obligation to provide such a program and claimed that the Handicapped Act provided an exclusive remedy for the conduct alleged.

The district court concluded that Defendants had a policy and practice of limiting the school year to 180 days and that this policy was in violation of the Handicapped Act and Section 504.[2] It further concluded, however, that

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1. The district court declined to rule on the Constitutional and Georgia statutory claims, having afforded full relief under the federal statutes.

2. *GARC v. McDaniel*, 511 F.Supp. 1263 (N.D. Ga. 1981).

Plaintiff and other members of the class did not demonstrate a need for such an extended school year. The district court therefore entered a declaratory judgment that the policies and practices of Defendants limiting the school year to 180 days were in violation of the Handicapped Act and Section 504, and it enjoined Defendants to henceforth consider the needs of all children for extended educational programs. The Court refused to require Defendants to provide a year-round education or anything more than 180 days to any specific children, including Russell Caine and the other three children on whose behalf the evidence was presented.

An appeal to the United States Court of Appeals for the Eleventh Circuit was filed by the Chatham County School District on June 12, 1981, and by all other parties at about the same time.

In September 1981, Russell Caine's parents voluntarily removed him from the Chatham County School District and had his records forwarded to Bulloch County. Chatham County moved the Eleventh Circuit to vacate the award against it for mootness, as no child within its jurisdiction had used the administrative procedures under the Handicapped Act to request an IEP of more than 180 days' duration.

The Eleventh Circuit affirmed the opinion of the district court and denied Chatham County's Motion to Vacate for Mootness. Judge Hill dissented on grounds not raised by any party, to wit, that the judiciary's role under the Handicapped Act of adjudicating the propriety of IEPs represented an unconstitutional delegation of legislative powers and responsibility to the federal courts.

Jurisdiction in the district court was founded on 28 U.S.C. § 1343 and 20 U.S.C. § 1415(e).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Decision Of The Eleventh Circuit Conflicts With Recent Decisions Of This Court Concerning A School Board's Duty To Provide Services Under The Handicapped Act.

a. Pennhurst v. Halderman

In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), this Court likened legislation enacted pursuant to the Spending Power to a contract. The legitimacy of Congress' power to legislate under the Spending Power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17.

If a state is unable to ascertain with precision what is expected of it under such legislation, there is no "knowing acceptance" of the conditions. "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously.*" *Id.* (emphasis added).

Congress, has, in a sense, recognized this rule. When it has intended to force the states to fund entitlements, as a condition of receiving federal funds, "it has proved capable of saying so explicitly." *Id.* at 18.

The principal flaw in the Circuit's decision is its failure to accept and apply this concept of "ambiguity" to the Handicapped Act. There simply is no requirement in the Handicapped Act that a recipient school system, once it has placed a handicapped child in an appropriate program, extend the duration of the program beyond the school year.

The Circuit Court did not point out an explicit, unambiguous provision of the Handicapped Act requiring extended placement. Rather, it inferred the requirement from the general duties imposed by the Act, such as the

need to make case-by-case determinations of placement and the obligation to provide an appropriate education. It did not, however, uncover any explicit requirement, because none exists.

The key to the Circuit's decision on this issue is stated in a separate one-sentence paragraph:

> Had Congress intended to defer to state durational practices . . ., there is no doubt it easily could have done so.

716 F.2d at 1577. The Circuit thus did precisely what this Court forbade in *Pennhurst*. It resolved an ambiguity in a Spending Power statute in favor of a plaintiff.

In other words, the rule announced by this Court in *Pennhurst* was that, when a state accepts funds under a Spending Power statute, it accepts only those duties and responsibilities explicitly and unambiguously tied to the receipt of funds. Duties cannot be imposed after the funds are disbursed.

The Circuit's imposition of a duty on Chatham County to promulgate an entirely new school year does not find a basis in an explicit or unambiguous provision of the Handicapped Act. No person in this litigation has pointed to an explicit provision of the Act dealing in any way, shape, or form with length of a school year. And, under *Pennhurst*, when a statute is silent on such a major topic, no duty can be assumed.

The Circuit decision conflicts directly with this holding. Instead of holding that the Plaintiffs must show Congress' explicit intention to affect the duration of the school year, it held that unless Congress' intention "to defer to state durational practices" is manifest, it will *assume* that Congress intended its legislation to affect such practices.

The rule imposed by the Circuit in interpreting the Handicapped Act is exactly the opposite of the rule im-

posed by this Court for the interpretation of Spending Power legislation. This overt failure or refusal of the Circuit to follow and apply Supreme Court precedent can be remedied only by this Court's grant of a writ of certiorari, and the writ should be so granted. *E.g., Schlude v. Commissioner*, 372 U.S. 128, 130 (1963).

b. Board of Education v. Rowley

The Circuit opinion fails to apply the principles set down by this Court in *Board of Education v. Rowley*, ... U.S. ....., 102 S.Ct. 3034 (1982). In *Rowley*, this Court struck down the lower court's ruling that a sign language interpreter must be provided to a deaf child. Three of the Court's holdings are particularly applicable to the present case: First, a substantive standard is "noticeably absent" from the Act; secondly, the Act "certainly . . . contains no requirement like the one imposed by the lower courts"; and third, the "Act imposes no clear obligation upon recipient states beyond the requirement that handicapped children receive some form of specialized education. . . ." *Id.* at 3042, 3045.

There simply can be no doubt that the program provided by Chatham County to PSMR children is appropriate to the education of PSMR children. These children receive much more than "some form of specialized education"; they receive a full school year of specially tailored individual instruction in a center especially designed to meet their needs.

Unfortunately, it is impossible to quantify either the term "appropriate" as used in the Handicapped Act or this Court's guidelines promulgated in *Rowley*. When a circuit court, however, holds that Chatham County, with its intricate, specialized, and extremely expensive PSMR program, has not provided the children with "some form of specialized education," it makes a mockery of this Court's decision in *Rowley*.

The Eleventh Circuit has, purely and simply, attempted to impose a substantive obligation on Chatham County which Congress did not explicitly impose in the Handicapped Act. The issue of judicial activism in imposing durational requirements under the Handicapped Act is one of enormous significance, not only in Chatham County or the State of Georgia, but throughout the United States. *E.g., Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545 (E.D. Mo. 1983); *Garrity v. Gallen*, 522 F.Supp. 171 (D. N.H. 1981); *Bales v. Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981). The number of cases involved, and likely to occur in the future, argues persuasively in favor of granting the instant writ, as does the number of states, school districts, and handicapped children involved. *E.g., United States v. Powell*, 330 U.S. 238, 240 (1947); *Steelworkers v. Usery*, 429 U.S. 305, 307, n. 3 (1977).

II. Section 504 Does Not Empower A Federal Court To Make Substantial Modifications To A School's Curriculum.

The unanimous decision of this Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), laid to rest any notion that there is an affirmative action requirement under Section 504. In *Davis*, this Court looked at the plain language of the statute and found that "neither the language, purpose nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." 442 U.S. at 411. Moreover, "Section 504 imposes no requirements upon an education institution . . . to effect substantial modifications of standards to accommodate a handicapped person." 442 U.S. at 413.

The Circuit completely ignored this language, distinguishing *Davis* on the grounds that the plaintiff in *Davis* could never have realized the benefit of her training. This distinction is wrong. The main thrust of *Davis* was that, although a school might need to bear "some costs" in assuring access of its programs to the handicapped, it need not bear the financial burden of major changes in its program. Section 504 simply does not authorize federal courts to impose major curricular changes on a school.

The central question in *Davis* was the difficult but necessary problem of drawing the distinction intended by Congress "between the even-handed treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." 442 U.S. at 410.

This standard is sometimes a difficult one to apply. The present case does not present facts as difficult as those in *Davis,* however, and the holding in *Davis* thus requires reversal of the Eleventh Circuit. While *Davis* strongly hinted that "modest" affirmative steps may be necessary if they grant handicapped persons *access* to a covered program, it did not require substantial changes in the *scope* of a covered program.

In the present case, the action requested is not modest; it is burdensome. If the relief involves expansion of the standard 180-day school year to 240 days, it will increase the Petitioners' operating expenses by one-third. If 270 days, it will increase the expenses by 50 percent, and a full-year program (i.e. 365 days) will increase expenses by over 100 percent. Even if only a few students "need" summer school, the facility must be opened and staff provided for an enormous range of services, a hugely inefficient use of limited education funds.

This is not a "modest" increase. Moreover, federal funds cover only twelve cents on the dollar of Chatham

County's present program. In *American Public Transit v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981), the D.C. Circuit found the DOC's proposed modification burdensome even though federal funds covered eighty percent of the changes, because there was no guarantee that the subsidies would continue. 655 F.2d at 1278, n. 12. It is much more extreme for a court to mandate affirmative actions, based on a funding statute, when the funds provided cover twelve percent of a program than when they cover eighty percent.

In addition, the affirmative action taken by the Petitioners is already far in excess of those required by Section 504. In *Davis*, this Court noted that the plaintiff could have participated successfully in the program if she had received "close, individual attention by a nursing instructor. . . ." 442 U.S. at 409. The plaintiff suggested that she could be given "individual supervision by faculty members whenever she attends patients directly." *Id.* at 407.

This Court explicitly found close individual attention to be the kind of affirmative action which cannot be required under Section 504. And yet, this sort of attention is already given to PSMR children by the Chatham County schools.

The student-teacher ratio at the facility is one-to-one. Per pupil expenditures are over eight times higher for the PSMR students than for normal children. The Petitioners have, under the Supreme Court's unanimous rule in *Davis*, far exceeded the requirements of Section 504. Whatever the requirements of the Handicapped Act may be, the requirements of Section 504 have been met and surpassed.

Furthermore, although the educational program in which the PSMR children participate is federally assisted (even if only twelve percent), the program was not available to non-handicapped individuals. The programs in-

tended to be covered by Section 504 are those programs normally provided to non-handicapped individuals and from which the benefits of the program historically have been denied to handicapped persons. The Chatham County program herein was created for PSMR children and only they participate in it. Therefore, the program in question was not one intended to be covered by Congress when it enacted Section 504.

Neither did the Respondents show that PSMR children in Chatham County are denied access to, denied the benefits of, or discriminated against in the provision of the program. The words "access," "benefits," and "discrimination" all refer to a deprivation of rights in existence which have been accorded others. The court below rationalized that the purpose of the program is to meet the unique educational needs of all the children, and that if a child needs a program of education in excess of 180 days, and doesn't receive it, then he has been denied the benefit of that program. The Circuit thus overlooked that year-round educational services is not an *existing benefit* under the program. The Circuit, in effect, has expanded the statute by requiring the creation of benefits rather than merely insuring that those benefits available to the non-handicapped will be available to the handicapped. A reading of the legislative history and the plain meaning of the statute makes it obvious that such a result was not intended by Section 504. Rather, it is more reasonable to conclude that Congress was apprehensive that children would be excluded from the school or classroom altogether solely by reason of their handicap.

Congress intended, through Section 504 and the Handicapped Act, that if a handicapped child could otherwise participate in a particular class or course, then that child would not be excluded solely because he didn't look right, walk right, or talk right. In the present case, however,

the right guarded by Circuit was not one of access, but one of end result, a right not covered by Section 504.

If the only disparate impact a plaintiff can show is evident in terms of the end result, no denial of equally effective services is proven. The plaintiff is not qualified "in spite of his handicap," the test established by *Davis*. The handicapped and non-handicapped in Chatham County are afforded equal care in both quality and quantity, and Section 504 cannot be applied to guarantee education results in these circumstances. Otherwise, the law would produce, at great expense, nurses who can function only with the personal attention of a lip-reader.

The gravamen of the Circuit decision is that some students cannot learn as much as other students in 180 days because of their handicap, no matter how good a specialized education is given to them. Their claim presupposes that Section 504 guarantees a result, and until the result is obtained, the state must give no consideration to expenditures.

Section 504 does not apply to this situation, because it is the handicap itself—mental retardation—which hurts the children's performance. The school system has not denied qualified children access to its education program because of their handicap. It has given unqualified children access to a program which, in terms of cost, is far better than the program given to the non-handicapped. Under this Court's holding in *Davis*, the requirements of Section 504 have thus been met and exceeded.

The Circuit decision seeks to impose a major change, in terms of both scope and cost on the Chatham County PSMR program. Changing an already highly expensive 180-day special program to a 365-day program is a major change in the curriculum. The County already allocates the funds for eight or nine normal students to each PSMR

child. To increase this amount substantially is an action of consequence beyond the scope of Section 504. This Court has forbidden the lower courts from using Section 504 in such a fashion. The Circuit decision is in direct conflict with the holding in *Davis*, and a writ of certiorari should be granted to clarify and enforce this Court's decision.

III. There Is No Case Of Controversy Between The County And Any Class Member, And The County Must Be Dismissed From The Litigation Under Article III.

Under Article III of the United States Constitution, no person can be forced to litigate a speculative issue. And yet, as to the County, the Circuit decision is no more than an advisory opinion. The County has been, by sheer disregard, stripped of its Constitutional protection.

To bring a district Court action under the Handicapped Act, a child must exhaust the relatively painless, speedy and inexpensive review procedures required by the Act itself. 20 U.S.C. § 1415(e); *Stubbs v. Kline*, 463 F.Supp. 110 (W.D. Pa. 1978). *See, e.g., FCC v. Schreiber*, 381 U.S. 279, 296-97 (1965). No such child resides in Chatham County, and there is no person empowered by statute to bring an action against the County.

Originally, Russell Caine and his parents had exhausted these procedures, and were empowered both to bring suit and to act as a class representative. In the middle of the lawsuit, however, the Caines voluntarily removed Russell from the Chatham County school system. The consequences of Russell's withdrawal, insofar as Chatham County is concerned, are considerable, and the result of the withdrawal is that Chatham County must be dismissed from the case under this Court's precedent. A number of factors bear on this question.

First, the Caines' action violated the procedures for IEP review provided in the Handicapped Act. Under 20 U.S.C. § 1415(e)(3), a child must remain in his current education placement until the Act's procedures are completed. These procedures include the review process in federal court. 20 U.S.C. § 1415(e). The Caines have thus disqualified themselves from receiving relief under the Handicapped Act.

Secondly, the provisions of the review procedures are a mandatory prerequisite to federal court jurisdiction under the Act. 20 U.S.C. § 1415(e). The Caines' mooting of their claim has left no person in the Chatham County school system who can maintain a federal court action under the Handicapped Act. Nobody but the Caines has been so aggrieved by the failure to place a PSMR child in a full-year program that they have used the simple appeal process to appeal an IEP.

Third, there is no reason not to apply the mootness doctrine to this case. The question, if it recurs, will not evade review. Children have a right to twelve years of education and, in this specific case, it is not the passage of time that has mooted the Caines' claim.

In addition, this is not a case where the Petitioners have taken action to render the case moot. Chatham County has been diligent in its efforts to retain Russell in his program. His withdrawal from the program was a voluntary action.

The Circuit refused to dismiss the action against Chatham County on the grounds that there was still a "live controversy" between the County and unnamed class members. 716 F.2d at 1571. It failed even to address, however, the issues raised by the County which take this case out of the class mootness exceptions created by such cases *Franks v. Bowman Transportation Co.*, 424 U.S. 747

(1976). First, exhaustion of the administrative procedures under the Handicapped Act are a jurisdictional prerequisite to filing suit under the Act. Secondly, because no person in Chatham County has even attempted to use these administrative procedures, there is no "unnamed member" of the County-wide class entitled to relief. This is not merely a matter of replacing a class representative; it is a matter of an entire class (of only 28 possible members) jurisdictionally disqualified from relief. Third, dismissing the action against Chatham County would have no effect on the litigation between the state-wide class and the State. Chatham County will, of course, abide by a decision involving the State; it simply refuses to be dragged into federal court when it has no legally cognizable dispute with any plaintiff.

The Circuit's refusal to dismiss the action as to the County is in direct contradiction to a long line of this Court's precedent and violates Article III of the Constitution. *E.g., Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973). A grant of the present petition is necessary to safeguard the County's rights to be free from such hypothetical litigation and to enforce this Court's precedent on mootness.

IV. There Is Significant Conflict Between The Courts Of Appeals In Different Circuits As To Whether Or Not The Handicapped Act Is An Exclusive Remedy.

This Court's precedent differentiating exclusive and non-exclusive statutory remedies is not in any way oblique. The crucial test is whether the statute under examination provides an aggrieved party with an express right of action. This is the rule which differentiates such cases as *Maine v. Thiboutot*, 448 U.S. 1 (1980), from such cases as *Brown v. GSA*, 425 U.S. 820 (1976).

In the *Thiboutot* case, this Court held that 42 U.S.C. § 1983 will support an action for benefits under the Social Security Act ("SSA"). Like the Handicapped Act, the SSA contains an elaborate internal remedial scheme for deciding claims. Unlike the Handicapped Act, however, the SSA does not provide a private right of action for persons who are still aggrieved after using the internal procedure. A person who claims rights under the SSA must look to a different federal statute to vindicate the rights granted.

Under the Handicapped Act, plaintiffs are not without a federal remedy. The Act provides an express private right of action. In such a case, the rule of *Brown v. GSA*, not that of *Thiboutot*, applies.

In *Brown*, the Court was faced with a plaintiff's attempt to bypass Section 717 of Title VII. It noted that Section 717 provided a comprehensive administrative and judicial scheme to remedy the employment discrimination claims of federal employees, including an express right of action in federal court. The Court, therefore, held that the remedy contained in Section 717 was an exclusive one.

Two secondary indicia of exclusivity were discussed in *Brown*. First, the issue was not whether a 717 action was cognizable under Section 1983, but whether other *substantive* statutes provided relief for violations of the same rights as were remedied in 717. Congress' purpose in passing 717 was to protect the rights of federal employees more adequately; it was concerned with the difficulty federal employees had in bringing actions to remedy employment discrimination. 425 U.S. at 827. An argument that a statute is exclusive is thus strengthened when the excluded statute is a substantive one that Congress has found insufficient to remedy the conduct covered by the exclusive statute.

Second, "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Id.* at 834. A statute, such as 717, that creates a balanced, complete, and integrated administrative scheme cannot be sidestepped by an earlier or more general statute. Otherwise, Congress' carefully drawn procedure "would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." *Id.* at 833. In other words, an administrative-judicial system created by Congress to handle a certain kind of case cannot be eliminated "by the simple expedient of putting a different label on the pleadings." *Id., quoting Preiser v. Rodriguez,* 411 U.S. 475, 489-90 (1973).

The present case sits on all fours with *Brown.* The primary factor is clearly present. Persons aggrieved by the placement of a handicapped child have a specific and express right to sue in federal court. 20 U.S.C. § 1415(e)(2). They do not need to rely on Section 504 to get relief in federal court.

Both secondary indicia are also present. First, the Handicapped Act covers precisely the subject matter of this appeal. When Congress enacted the Handicapped Act, it clearly believed that it was establishing a right inadequately protected by prior laws. In the Senate debate, Senator Randolph stated:

> Too long have the needs of these handicapped children *been neglected* . . . The [Handicapped Act] promises handicapped children the educational opportunity that has long been considered the right of every other American child.

121 Cong. Rec. 37410 (1975).

Senator Taft stated, in a similar strain:

> The goal of this legislation is to raise the quality of education for millions of handicapped children to a new standard and equal opportunity never before envisioned.

121 Cong. Rec. 37412 (1975). Echoing his sentiments, Senator Williams stated that "handicapped children will no longer be left out." 121 Cong. Rec. 27413 (1974).

Congress wished to defer educational decisions to educators and not have the judiciary become involved in adjudicating disagreements between parents and professional educators except as a last resort. This is why it required a detailed procedure for resolution of the parents' grievances at the administrative level. 20 U.S.C. § 1415(b)-(d). This administrative exhaustion requirement is in recognition of the doctrine of Judicial Abstention long embraced by the courts, which refrain from interfering with educators in their instructional decisions.

The exhaustion requirement is closely tied to another general statutory rule of construction: where there are two statutes on the same issue and they are in conflict, the specific statute always controls over the more general one. *Bulova Watch Company v. United States*, 365 U.S. 753 (1961); *Morton v. Mancari*, 417 U.S. 535 (1974); *Radzanower v. Touche Ross*, 426 U.S. 148 (1976). This is true regardless of the priority of the enactment in time. *Bulova Watch Company, supra.*

The Handicapped Act is much more specific than Section 504, and the two Acts have conflicting purposes. The Handicapped Act applies only to the field of education and then only to the school-aged children. Further, it is replete with detailed procedures and contains a grievance mechanism at the district level for parents who wish to controvert the education programs of their children. The Court under

the Handicapped Act has broad discretion in shaping a remedy for the aggrieved party, since under Section 1415 (e) (2) it can "grant such relief as the court determines is appropriate." Moreover, a substantial conflict exists between Section 504 and the Handicapped Act. The latter clearly defers educational decisions to educators through the administrative procedures contained in Section 1415. Section 504 does not. Therefore, a substantial purpose of the Handicapped Act was frustrated by the Eleventh Circuit's decision.

The other reason for citing Section 504 is attorney's fees, which are available under Section 504 but not under the Handicapped Act. Congress quite clearly did not intend to make attorney's fees available to plaintiffs who sue in federal court to protest the program given a handicapped child. "[T]he law of the United States . . . has always been that, absent explicit Congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon v. McCrary*, 427 U.S. 160, 185 (1976).

This rule, as it concerns both the Handicapped Act and attorney's fees, was applied by the Seventh Circuit in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981). In *Anderson*, the plaintiffs sued under both the Handicapped Act and 42 U.S.C. § 1983 challenging the placement of their handicapped daughter in public school. They prevailed in their suit. The Court of Appeals refused, however, to award monetary damages or attorney's fees, which were available under Section 1983 but not under the Handicapped Act, holding that "the judicial remedy provided in [the Act] was intended to be exclusive." *Id.* at 1217.

One major factor cited by the Court was the difference in remedy provided by Section 1983 and the Handicapped Act. *Id.* at 1216. Just as Section 504, Section 1983 provides a remedy inconsistent with Congressional intent

in passing the Handicapped Act; that is, both Section 504 and Section 1983 provide for an award of attorney's fees. When a specific statute provides for a scheme of enforcement different from that of a more general statute, the use of the remedy in the general statute impairs the effectiveness of the more specific statute. It adds an element Congress did not intend. *See Adickes v. Kress & Co.*, 398 U.S. 144, 150-51, n. 5 (1970); *Anderson*, 658 F.2d at 1215-17, 1216 n. 16.

Thus, the very reason the Plaintiffs seek to use Section 504 belies their right to do so. They seek to avoid exhaustion in precisely the situation Congress has demanded exhaustion. They seek attorney's fees in precisely the situation where Congress has deemed such an award improper. The trade-offs made by Congress should not be repealed by judicial action, and the Handicapped Act should be found to be an exclusive remedy in the narrow cases where it applies.

There are thus two related questions which have arisen frequently since passage of the Handicapped Act, and they are the subject of conflicting decisions among the various Circuits. The first question is whether the Act provides an exclusive remedy for a handicapped child who is aggrieved at his educational placement: *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) (Act exclusive); *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980) (Act not exclusive); *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983) (attorney's fees provision of Section 504 and Section 1988 not available in case covered by the Handicapped Act); *Doe v. Koger*, 710 F.2d 1209 (7th Cir. 1983) (attorney's fees not available under Section 1988); *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982) (Section 504 applicable only to "bad faith or gross misjudgment" by school officials; Section 1988 available for attor-

ney's fees); *Timms v. Metropolitan School District*, 718 F.2d 212 (7th Cir. 1983) (Handicapped Act exclusive of Section 504).

The second question is whether the administrative procedures of the Handicapped Act must be exhausted prior to filing suit even if another federal statute, such as Section 504 or 28 U.S.C. § 1983, can support the claim. *Ezratty v. Puerto Rico*, 648 F.2d 770 (1st Cir. 1981); *Reineman v. Valley View Community School District No. 365-U*, 527 F.Supp. 661 (N.D. Ill. 1981) (exhaustion required for 94-142 claim brought under Section 504); *Akers v. Bolton*, 531 F.Supp. 300, 315-16 (D. Kan. 1981) (94-142 exhaustion required under Section 504); *Sheeran v. M.A. Bruder & Sons, Inc.*, 524 F.Supp. 567 (E.D. Pa. 1981); *H.R. v. Hornbeck*, 524 F.Supp. 215, 221 (D. Md. 1981) (citing eight more cases in support of its finding that exhaustion under 94-142 is prerequisite to maintaining a Section 504 suit).

This wide range of conflicting decisions in these two related areas can only be resolved by a writ of certiorari. In light of both the damage done to the integrity of the Handicapped Act by the Circuit decision and the confusion among the Circuits, the instant Petition should be granted.

CONCLUSION

The decision of the Eleventh Circuit cannot be squared with this Court's decisions in *Pennhurst*, *Rowley* and *Davis*. Neither the Handicapped Act nor Section 504 gives federal district courts *carte blanche* to legislate the duration of the school year in a district where appropriate educational services are provided to handicapped students.

The question raised in this Petition are ripe for certiorari, for a number of reasons. First, of course, the Circuit's decision makes a travesty of this Court's recent deci-

sions; while paying lip service to *Pennhurst*, for example, the Circuit has clearly imposed an obligation on the State which is not explicit, and is only arguably implied, in the Handicapped Act, a statute passed under the Spending Power.

Second, this case presents four issues which have generated considerable litigation and which apparently will recur again and again until this Court clarifies the law: whether a state may be forced to extend its school year if it receives funds under the Handicapped Act; whether a federal court may mandate such an extended school year under Section 504; whether the Handicapped Act presents an exclusive remedy for handicapped children who claim inappropriate educational placement; and whether the procedures available under the Handicapped Act to protest the placement of handicapped children must be exhausted prior to bringing a federal court action.

Third, the last three of these issues are the subject of considerable conflict among the various Circuits. The law is in an extreme state of confusion and badly needs the clarification that can only come from this Court.

Fourth, the subject area is one of considerable public importance on both sides. The squeeze on public education funds, the declining quality of public schools, and the importance of quality public education are well-publicized current problems, and any substantial drain on these resources presents a question of national significance. On the other hand, the needs of handicapped children are compelling and must be met. Each side in the case represents the interest of a national priority.

Finally, the case presents an interesting question of mootness which will find applicability in a broad range of actions: under a cause of action with an administrative remedy prerequisite to federal jurisdiction, must a class

action be dismissed when the claim of the only member to have satisfied the prerequisite is mooted? The Eleventh Circuit has said "no," but its decision is an apparent conflict with the case or controversy requirements of the Constitution.

The Petitioners therefore pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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